UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

STATE OF MAINE, *et al.*,

Plaintiffs,

v.

ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, *et al.*

Defendants and

HOULTON BAND OF MALISEET INDIANS and PENOBSCOT NATION,

Defendants-Intervenors.

Civil Action No. 1:14-cv-264 JDL

DEFENDANT-INTERVENOR HOULTON BAND OF MALISEET INDIANS' RESPONSE TO EPA'S MOTION FOR VOLUNTARY REMAND AND INCORPORATED MEMORANDUM OF LAW

Defendant-Intervenor Houlton Band of Maliseet Indians ("Houlton Band" or "Band") opposes the request by the U.S. Environmental Protection Agency ("EPA") for voluntary remand of the February 2015 decisions challenged in this case. Dkt. 139. EPA has already reconsidered, and reaffirmed, these same decisions during a protracted stay of this litigation. The sole bases for EPA's eleventh-hour request—the seating of new political appointees and an extra-record Interior Department letter—fall well short of satisfying EPA's legal burden. If the Court nevertheless grants a remand, it should not vacate the decisions, which EPA has deemed necessary to prevent harm to the public health, including that of Houlton Band members engaged in sustenance fishing, and it should deny Maine's request for an arbitrary 120-day deadline on any remand period.

BACKGROUND

The State of Maine originally sued EPA in July 2014 for failure to timely approve or disapprove revised surface water quality standards ("WQS"). Dkts. 1, 7. This claim became moot when EPA, after taking public comment, issued formal approvals and disapprovals of the standards ("February 2015 decisions") in accordance with the Clean Water Act ("CWA"). Dkts. 22, 22-1, 22-2, 26. Rather than revise its WQS to address public health concerns identified by EPA, Maine chose to litigate, filing its second amended complaint in October 2015. Dkt. 30.

Because Maine failed to correct its WQS, the CWA compelled EPA to promptly propose and promulgate federal replacement WQS. 81 Fed. Reg. 92,466, 92,467-69 (Dec. 19, 2016); 33 U.S.C. § 1313(c)(3), (4). The Houlton Band, Penobscot Nation, the State, towns, industrial entities, and private citizens participated in that notice and comment rulemaking. 81 Fed. Reg. at 92,475-76. On December 8, 2016, EPA finalized the "Promulgation of Certain Federal Water Quality Standards Applicable to Maine" ("Maine Rule" or "Rule") and provided a 231-page

Response to Public Comments ("RTPC"). 81 Fed. Reg. at 92,466, 92,475-85, 92,487 (RTPC summary); Dkt. 98-1 (RTPC). Public comments overwhelmingly supported the Rule, which took effect January 18, 2017.[1] 81 Fed. Reg. at 92,466, 92,476; Dkt. 62. These WQS are designed to protect the health of those engaged in sustenance fishing—in particular, members of the Houlton Band and other tribes. 81 Fed. Reg. at 92,468. These WQS are the first ever to apply in Indian waters in Maine. *See id.* (Rule fills "gap in protection"). Maine declined to challenge the Rule in this litigation, and the WQS remain in full operation and effect. Dkt. 151 at 4.

On December 27, 2016, the Court granted the Houlton Band's motion to intervene as of right to defend the February 2015 decisions. Dkt. 70. The Court set an extended schedule for merits briefing, Dkt. 84, to provide time for new EPA political appointees to familiarize themselves with the case. Dkt. 80 at 7 (EPA requesting 90 days between briefs for "sufficient review time for EPA after the transition to the new Administration with new EPA officials").

Prior to any briefing, Maine filed a petition for rulemaking under 5 U.S.C. § 553(e) on February 27, 2017, asking the new Trump Administration: 1) to reconsider and withdraw the February 2015 decisions in substantial part, and 2) to repeal and withdraw the Maine Rule establishing federal WQS. Dkt. 93-1 at 3. The petition included Maine's 57-page complaint from this litigation, and the Maine Attorney General's and Department of Environmental Protection's comments on the Rule. Dkt. 93-1. On March 6, 2017, several dischargers filed a similar petition. Dkt. 93-2. The Band provided a detailed response to the petitions on July 18, 2017. Declaration of Jane Steadman ("*Steadman Decl.*") (Exhibit 1). The U.S. Department of the Interior was provided these materials, but to the Band's knowledge did not comment on the petitions. *Id.* ¶ 2.

[1] "One striking aspect of the comments EPA received on its proposal is that every individual who commented supported EPA's proposed action, including many non-Indians. . . . It is notable that the record for this action shows that individuals in Maine who commented did not express concern that the tribes are being accorded a special status or that this action will in any way disadvantage the rest of Maine's population." 81 Fed. Reg. at 92,476.

EPA successfully moved for two stays of this litigation—the first for 90 days and the second for 120 days—to consider the petitions. Dkts. 101, 108. EPA advised this Court that the stays were necessary to enable new political appointees to study the challenged decisions, Dkt. 93 at 2, and to determine whether any portions of the decisions would be withdrawn or changed, Dkt. 103 at 1-2. After over nine months of review, EPA denied the petitions on December 8, 2017: "*After careful consideration, EPA has determined not to withdraw or otherwise change any of the decisions that are challenged in this case.*" Dkt. 109 at 2 (emphasis added).

Maine filed its opening merits brief on February 16, 2018, Dkt. 118, and EPA was scheduled to file its brief on June 21, 2018. Three days before this deadline, EPA received a one-week extension, representing that the extension was necessary because "EPA's internal review of its draft Merits Brief has coincided with other pressing matters requiring the attention of senior EPA reviewers." Dkts. 130, 131. Two days before the new deadline, EPA and Maine moved to extend all briefing deadlines, this time for settlement discussions. Dkt. 132. On July 27, 2018, EPA reported that those discussions were not successful, and moved for voluntary remand. Dkt. 139. EPA cited three new political appointees and an April 27, 2018 letter from Interior Department Principal Deputy Solicitor Daniel Jorjani to EPA's general counsel ("2018 Interior letter") as grounds for its remand request. *Id.* at 2-3.

ARGUMENT

I. EPA's Request for Voluntary Remand Should Be Denied

The Court has "broad discretion" to deny EPA's motion for voluntary remand and decide this case on the merits. *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 381 (2017). A court may grant an agency's motion for voluntary remand when: 1) "new evidence comes to light after the agency made its decision," 2) "intervening events beyond the agency's control arise after the agency has acted and could affect the validity of the agency's decision," or 3) "other substantial

and legitimate concerns warrant remand." *Bayshore Cmty. Hosp. v. Hargan*, 285 F. Supp. 3d. 9, 15 (D.D.C. 2017) (internal citations and quotation marks omitted) (summarizing D.C. Circuit and other case law); *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010) (same). EPA makes no serious effort to meet this standard. It "does not . . . concede legal error" as to the February 2015 decisions, Dkt. 139 at 4, and its attempt to escape judicial review should be denied.

To begin, the Houlton Band is aware of no decision granting voluntary remand merely because new political appointees are in place. Maine's petition to reconsider the February 2015 decisions and WQS, and EPA's second review of the voluminous administrative records supporting them, caused a seven-month stay of this case. Following that review, the Trump Administration determined in December 2017 not to change a single comma in the decisions. *Supra* at 3-4. Thus, this Administration's EPA has *already* completed a recent, comprehensive review that confirmed the validity of the February 2015 decisions, including as to the three issues identified in EPA's motion. Dkt. 139 at 2. The appointment of three new political officials within the same administration does not remotely constitute "new evidence" or an "intervening event[] beyond the agency's control," or otherwise satisfy the criteria for remand. *See Jumping Frog Research Inst. v. Babbitt*, No. C 99-01461 WHA, 1999 U.S. Dist. LEXIS 23175, at *5 (N.D. Cal. Dec. 15, 1999) (denying voluntary remand because agency "had ample opportunity to reevaluate its decision of its own accord" before remand request); *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Norton*, 527 F. Supp. 2d 130, 136 (D.D.C. 2007) (denying voluntary remand where agencies were on notice of issues cited as basis for remand and case had been pending for five years).

Nor does the 2018 Interior letter—which changes nothing—provide a legitimate basis for

remand. First, as EPA acknowledges, the letter is not part of the Administrative Record in this case.[2] Dkt. 129 at 2. Second, the letter explicitly "affirms" virtually all the conclusions reached by Interior in its prior 2015 letter, including that "to be rendered meaningful, [the Southern Tribes' federally-protected] fishing rights by necessity include some subsidiary rights to water quality[.]" Dkt. 129-1 at 2-3. Third, the letter "recognize[s] the centrality of sustenance fishing to the culture of the Northern Tribes," such that WQS in their waters "may not be dissimilar from the WQS established for the Southern Tribes[.]" *Id.* at 3 & n.18. In fact, Interior—on multiple occasions, across different administrations—has affirmed the Houlton Band's federally-protected fishing rights as established by federal statute and federal Indian law. *See*, *e.g.*, *Steadman Decl.* (Exhibit 2); Dkt. 22-4 at 4-10 (2015 Interior letter analysis); Dkt. 22-2 at 5-32 (EPA's independent analysis). Nevertheless, the 2018 Interior letter notes vaguely that it is "unable to identify with similar clarity federally-protected tribal fishing rights" of the Northern Tribes. Dkt. 129-1 at 3. The letter, however, does not mention, let alone analyze, the Interior Department's multiple prior opinions or the federal laws and legislative history in which it rooted those opinions. Nor does the letter disavow the opinions and the existence of the Houlton Band's federally-protected fishing rights that they confirm.

The 2018 Interior letter is simply not the type of intervening event, such as "a new legal decision or the passage of new legislation" or new evidence, that supports voluntary remand.[3] *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001); *Lutheran Church-*

[2] EPA placed both the extra-record petitions and the extra-record 2018 Interior letter on the docket in this case. The Houlton Band files herewith the entirety of its submissions to EPA and Interior in response to those documents.

[3] The 2018 Interior letter also suggests using a different definition of "sustenance" than in the 2015 Interior letter, Dkt. 129-1 at 3, but EPA's February 2015 decisions do not include the prior definition, *see* Dkt. 22-2. Interior also comments—for the first time—on the Wabanaki Traditional Cultural Lifeways Exposure Scenario, a peer-reviewed estimate of traditional sustenance fish consumption. Dkt. 129-1 at 4. But EPA, not Interior, is the expert agency on technical aspects of the Human Health Criteria ("HHC"), *e.g.*, *Steadman Decl.* (Exhibit 1.P), and has confirmed many times that this is the "best currently available information for . . . deriving an [fish consumption rate] for HHC adequate to protect present day sustenance fishing," *e.g.*, 81 Fed. Reg. at 92,480; Dkt. 22-2 at 3, 39-43.

Missouri Synod v. FCC, 141 F.3d 344, 349 (D.C. Cir. 1998) (denying "last second motion to remand" based on a "post-argument 'policy statement'" that "[did] not bind" the agency and where agency "[had] not confessed error"); *cf. Carpenters Indus. Council*, 734 F. Supp. 2d at 131, 133-35 (granting remand where Interior's Inspector General issued post-decisional investigative report finding former political appointee had taken actions that potentially jeopardized the decisional process).

In short, with EPA having recently completed a comprehensive, nine-month review that confirmed the validity of the February 2015 decisions, the appointment of three new political officials and a late-arriving letter devoid of analysis and carrying no legal weight simply do not warrant remand.

II. If the Court Grants EPA's Motion for Voluntary Remand, the Court Should Not Vacate the Challenged Decisions

If the Court grants a voluntary remand, which it should not for the reasons expressed above, the Court should deny Maine's request to vacate the February 2015 decisions. Dkt. 151 at 3-7. The State correctly notes that the First Circuit has not addressed the question and that district courts have taken different approaches to the issue. *Id.* at 3.

The plain language of the Administrative Procedure Act ("APA") and basic tenets of remedies law, however, dictate that the correct approach is that taken by those courts holding that vacatur pending a voluntary remand is not available. Under the APA, a court has jurisdiction to "set aside"—or vacate—only those agency actions that the court "hold[s] unlawful." 5 U.S.C. § 706(2). It is axiomatic that a plaintiff is not entitled to relief unless it succeeds on the merits. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) ("[T]he nature of the . . . remedy is to be determined by the

nature and scope of the . . . violation." (internal citation and quotation marks omitted)). Here, where EPA has requested a remand in lieu of filing its merits brief, the Court necessarily has not rendered a decision on the merits. Nor has the agency completed the necessary procedures to revise its decision on its own initiative. The only sensible rule, then, is that adopted by districts courts in the D.C. Circuit—the remedy of vacatur is not available on voluntary remand.[4] *E.g.*, *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (rejecting voluntary remand with vacatur because it would "allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice-and-comment, without judicial consideration of the merits"); *Carpenters Indus. Council*, 734 F. Supp. 2d at 135-36 (same).

Even where a court finds an agency action to be defective—which again, has not occurred here—vacatur is not automatic. *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001). Instead, the court must evaluate both: 1) "the seriousness of the . . . deficiencies," and 2) "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal citation and quotation marks omitted). Courts typically do not vacate agency actions pending remand where doing so would risk harm to the environment or public health. *E.g.*, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (air quality protections); *U.S. Sugar Corp. v. EPA*, 844 F.3d 269, 270 (D.C. Cir. 2016) (air pollutant emission limits); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (endangered species protections).

Here, no deficiencies have been identified. EPA has not suggested *any* legal error. Across two different administrations, EPA has concluded that the February 2015 decisions are legally sound. *E.g.*, Dkt. 109 at 2 ("After careful consideration, EPA has determined not to withdraw or

[4] This Court and the First Circuit routinely look to decisions from courts in the D.C. Circuit for guidance on questions of administrative law. *See, e.g.*, *N.H. Hosp. Ass'n v. Azar*, 887 F.3d 62, 71, 75 (1st Cir. 2018); *Me. Council of the Atl. Salmon Fed'n v. Nat'l Marine Fisheries Serv.*, 203 F. Supp. 3d 58, 78, 80-81 (D. Me. 2016).

otherwise change any of the decisions that are challenged in this case."). Neither EPA nor Defendant-Intervenor Tribes has filed merits briefs, and this motion is not a proper vehicle to litigate the more than 20 different issues raised by Maine in its 60-page merits brief. *E.g.*, Dkt. 118 at ii-iii. In this situation, vacatur is not warranted.

Vacatur of the February 2015 decisions would also produce "disruptive consequences" threatening public health and the environment. The decisions recognize and approve a designated use of sustenance fishing in Indian waters and disapprove several of Maine's human health criteria because they did not protect that use. Dkt. 22-1. These decisions provide the foundation for the Maine Rule (the WQS now in effect), which was designed to protect the health of tribal members and other Mainers engaged in sustenance fishing. 81 Fed. Reg. at 92,468. These are the first WQS ever to apply in Indian waters in Maine, filling the prior "gap in protection." *Id.* at 92,468; Dkt. 22-1 at 2. And they are critical to Band members: while sustenance fishing has been at the heart of their culture since time immemorial, pollution in the Meduxnekeag River has sullied the fish and endangered tribal members' health. EPA004836-4839; EPA004849; EPA004853-4854; EPA005304-5305; EPA005340-5341. The February 2015 decisions and the Maine Rule are necessary to redress that pollution.

Vacatur of the February 2015 decisions would shake the foundation of the water quality regime in Maine because it would call into question the WQS predicated on those decisions. This sudden change to the status quo would surely create confusion in the regulated community, particularly given that Maine has staked out its formal opposition to the WQS in Indian waters.[5]

[5] To the extent Maine argues it should not have to consider the sustenance fishing designated use in 401 certifications, vacatur of the challenged decisions would not relieve the State of that obligation given that the Maine Rule, by its own admission, will remain in full force and effect. Dkt. 151 at 5 & n.4. Thus, vacatur would provide Maine no practical relief. *See, e.g.*, *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151-52 (D.C. Cir. 2005) (ordering remand without vacatur where parties seeking vacatur could not demonstrate that rule would do "affirmative harm" or have a "detrimental effect" pending remand).

And it is no answer that the State is not asking the Court to vacate the Maine Rule, Dkt. 151 at 4, which it cannot do because it chose not to challenge the Rule in this case. The State makes no secret of its intent to challenge the Rule in a collateral proceeding if it prevails in this litigation—that is, *if the February 2015 decisions are set aside*. *Id.* Vacatur would accomplish exactly that. In other words, vacatur would enable Maine or individual dischargers—without ever having prevailed on the merits in this litigation—to advance their attack on the WQS deemed necessary by EPA to protect the public health of all Mainers. Maine's request for vacatur should be denied.

III. If the Court Grants a Voluntary Remand, It Should Not Set a Specific Time Limit

The Houlton Band agrees that, if the Court grants EPA's voluntary remand request (which, for the reasons expressed above, it should not), this case should be held in abeyance or stayed pending remand. But it strongly disagrees with Maine's request to impose an arbitrary 120-day limit on the remand process. *See* Dkt. 151 at 7. EPA took nine months to consider Maine's petition for reconsideration. Maine caused that delay. If there is a remand, and if EPA is to seriously reconsider the decisions it has affirmed twice over, EPA must not truncate that process. Rather, EPA must follow a public process to develop the record that is at least as robust as the process it used to arrive at the decisions in the first place. *E.g.*, *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983); *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015) (noting need to supplement record and opportunity for public to present new evidence on voluntary remand).

That process will necessarily include public notice and comment, the opportunity for interested parties to develop additional materials, and sufficient time for EPA's own review of the new administrative record produced on remand. *See* Dkt. 22-3 at 1-2 (EPA public notice and comment process allowed it "to seek additional public input to better inform its approval/disapproval decision and to ensure that any potential flaws in the State's public process

are remedied"). Government-to-government consultation with the Houlton Band will also be necessary, as Interior acknowledged, to address its federally-protected sustenance fishing rights. Dkt. 129-1 at 3 n.18. At this point, the Houlton Band does not know what type of information EPA will need for its analysis, nor how much time the Band (a small tribe with few staff members and minimal financial resources) will need to gather and present the information. The hasty remand period proposed by Maine would not provide sufficient time for the Band to develop, and for EPA to review, information that may be necessary to resolve these issues.

If this Court orders a voluntary remand, it is well within its discretion to do so without setting any deadline. *See*, *e.g.*, *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009) (declining to set time limit on voluntary remand); *Elec. Workers Ins. Fund v. Sebelius*, No. 08-14738, 2010 U.S. Dist. LEXIS 17111, at *1, 16-18 (E.D. Mich. Feb. 25, 2010) (denying request on voluntary remand and noting that "court imposed deadlines on remand are extraordinary"). The Court may require EPA to file periodic status reports if it wishes to be apprised of the status of proceedings at the agency. *See*, *e.g.*, *Carpenters Indus. Council*, 734 F. Supp. 2d at 137 (ordering filing of periodic status reports on voluntary remand).

CONCLUSION

For the foregoing reasons, the Houlton Band respectfully requests that the Court deny EPA's motion for voluntary remand and enter a revised briefing schedule. If the Court grants EPA's motion, the Band requests that remand be without vacatur or a deadline for completion.

Respectfully submitted this 28th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I electronically filed the above Defendant-Intervenor Houlton Band of Maliseet Indians' Response to EPA's Motion for Voluntary Remand and Incorporated Memorandum of Law and Declaration of Jane G. Steadman in Support of Defendant-Intervenor Houlton Band of Maliseet Indians' Response to EPA's Motion for Voluntary Remand and Incorporated Memorandum of Law with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties listed on the electronic service list within the CM/ECF system.

Dated at Seattle, Washington this 28th day of September, 2018.

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